No. 11596

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC., *Appellant*,

vs.

CLARK SQUIRE, individually and as Collector of Internal Revenue for the District of Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
JOSEPH J. LANZA,
Attorneys for Appellant.

918 Joseph Vance Building,
Seattle 1, Washington.

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CASES CITED

STATUTES

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REPLY BRIEF OF APPELLANT

As stated in our opening brief, the facts of this case are not in dispute. Therefore this court is free to review the facts and to substitute its own judgment untramelled by the findings and conclusions of the District Court.

Appellee does not take issue with this statement. However, in stating the facts, he refers almost exclusively to the findings of the District Court, in an obvious attempt to ignore the rule stated.

On the whole, appellee's brief repeatedly seeks to confuse the uncontroverted evidence, and continually indulges in inferences, assumptions, arguments and conclusions, not only unwarranted by the facts, but

actually in the very teeth of the terms of the contract and the uncontradicted testimony as to the practices followed thereunder.

For example, the statement that "The commission received from such activity became the property of tax payer" at page 4, is nothing but a conclusion of the trial court unsupported by the evidence, completely ignoring the uncontradicted testimony that until earned, the commission is the property of neither, and that only one-half thereof ever enters the profit and loss account of appellant.

The statement at page 4 that "Regular sales meetings were attended by both tax-payer's salaried real estate salesmen and the brokers herein involved" implies that the salesmen and brokers attended the same meetings, leaving inference that the instructions, dictation and control as to the salesmen, extended also to the brokers. But these are the admitted facts:

At the daily employee meeting, at which the *employees* are *required* to attend, work is assigned, reports are required, and instructions given. While at the *brokers* meeting, held at an *entirely different hour*, which the brokers need not and do not regularly attend, only general real estate news and matters of general real estate interest are discussed and made available.

The same confusion is attempted by reference to assignments of listed properties. The statement is true insofar as the employee-salesmen were concerned, but definitely untrue as to the brokers involved herein.

The use of the word "discharged" is likewise mis-

leading. It finds no basis whatsoever in the documentary or oral proof. It is found only in the court's findings as a conclusion wholly unsupported by the evidence. Its use therefore, begs the very question at issue—for obviously the word can only properly be used in connection with an employer—employe relationship.

Despite announcement of the rule that a liberal interpretation of the employment relationship must be applied in determining coverage under the Social Security Act, the fundamental governing principle as announced by the Supreme Court in *United States v. Silk* and *Harrison v. Greyvan Lines, Inc.*, 91 Law. Ed. Adv. Op. 1335, must not be lost sight of, viz: that it was not the purpose of Congress "to make the Act cover the whole field of service to every business enterprise," and that "there is no indication that Congress intended to change *normal business relationships* through which one business organization obtains the services of another to perform a portion of production or distribution."

Turning to the cases cited by appellee at pages 7 and 8 of his brief, involving decisions of this court on the question of coverage under the Social Security laws, it is significant that in three of those cases, this court found the existence of either a partnership, joint adventure, or independent contractor relationship, despite the same argument by government counsel made in this case, that the more liberal interpretation required the finding of an employee-employer relationship.

Thus in *United States v. LaLone*, 152 F.(2d) 43,

this court in reversing the District Court with instructions to enter a judgment affirming the decision of the Social Security Board which had previously ruled that the individual involved was not an employee, but a partner or joint venturer, said, speaking of the *Hearst* case:

> "We do not believe that *N.L.R.B. v. Hearst Publications* necessitates a ruling in this case that LaLone was an employee of Barrett & Co. In that case the Supreme Court refused to follow the rigid common law concepts of employee-employer in interpreting a statute similar to this one. But the court recognized that: 'Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight."

Likewise, in *United States v. Aberdeen Aerie*, 148 F.(2d) 655, this court affirmed the judgment of the District Court holding that physicians for a fraternal organizations were not "employees" within the meaning of the Act despite the government's insistence that the *Hearst* case required a contrary conclusion. It will be recalled there that the physicians were elected annually by the Aerie membership to render professional services to the members for which they were compensated by the Aerie at the rate of $.50 per quarter for each member in good standing during the

preceding quarter. The lodge furthermore exercised some supervision by requiring that the physicians submit reports periodically and maintain regular office hours, and by defining the types of diseases or injuries which the physicians may treat.

And in *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914, this court affirmed the holding of the District Court that various miners who had leased underground portions of a mine from the mine owner were independent contractors, despite the fact that the owner furnished tools, had the right of inspection, and the right to require the discharge of objectionable workmen, and the miners had the duty to perform in miner-like manner. The *Hearst* case had not yet been decided, but it was the position of the government that the regulations promulgated under the Act, which are almost identical with those quoted in the appendix to his brief herein, required a contrary holding.

It is worthy of notice that this court in the *Empire Star Mines* case discussed in detail the contrast between the procedure followed by the mine owner with respect to its admitted employees and the miners in question. We have attempted to point out similar contrasting differences in our opening brief between appellant's admitted salesmen employees and the brokers in question herein.

The fourth case decided by this court cited by appellee—that of *Matcovich v. Anglim*, 134 F.(2d) 834, is the only one of the four in which the employment relationship was found to exist. That case involved

the status of a "taxi dancer" and the court there found that under "ordinary standards" an employer-employee relationship was indicated from the large degree of control that was exercised by the dance hall operator as to hours of work, dress, deportment and behavior.

In discussing the *Silk* and *Greyvan* cases, appellee states that the factor upon which the Supreme Court "apparently placed the most emphasis" (Br. 16) was the capital investment risked by the truckers. This, in the face of the court's own pronouncement that no one factor is "controlling" and that the "total situation" must be considered in determining coverage under the Act.

In any event, contrary to appellee's attempt to minimize the broker's investment in the enterprise, the record is clear that each broker owned his own car, paid his own bond premium and fee for broker's license, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. The nature of their occupation called for no greater investment. The contention that the evidence failed to establish that a car was a "necessary tool" in the real estate business, and that "it is not unreasonable to assume that a broker who customarily specialized in down town business property, for instance had no need for a car" (Br. 19), demonstrates such extreme naivete of either the nature of the real estate business or of the size of the city of Seattle, as to hardly warrant comment. Undoubtedly, government counsel, writing appellee's brief from Washington, D. C., also labor under the

assumption that cowboys, Indians, and prospectors on their way to the gold fields of Alaska, constitute the bulk of the city's inhabitants, and that Seattle's business and commercial district is just a matter of a few blocks walking distance.

At page 17, appellee compares the ingenuity that may be exercised by the broker in selling real estate, with that exercised by a waiter to increase his tips, or by any other piece worker on a commission basis. The comparison is not even close as it overlooks completely the many other controls exercised over such manual workers.

The statement is made at page 19 that "the evidence showed that individual brokers were ordinarily assigned a special territory in which to work." This statement is absolutely contradictory of the evidence which established beyond peradventure that there was no limitation as to territory, and that any restriction was of the broker's own choosing.

Appellee cites *Jones v. Goodson*, 121 F.(2d) 176 (C. C.A. 10) which held that tax drivers working for a cab company were employees. The purchase of gasoline and oil by the drivers was a very insignificant element in the case compared to the many controls otherwise exercised by the company, such as the right to determine the shift to be worked, the selection of the car to be driven if a company owned car, the territory to be covered, and the right to discharge for infraction of rules. The drivers furthemore, were required to paint the company's insignia on their cars and to telephone their whereabouts hourly.

At page 19, appellee admits that a certain amount

of skill is required on the part of
argues that this is unimportant bec
true of doctors, lawyers and scientist
private employment. Such argumer
looks the many other factors that
ent in giving rise to the employment
as the maintenance of regular hou
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or assignment of the work to be p
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If these brokers are not "small
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material, as is likewise the fact that
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upon cessation of their relationship

selling of real estate. To say that the leade
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appellant selects and trains the brokers, is
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portant elements present in the orchestra cas
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But the analogy limps in other respects. T
certainly no evidence of "training" of the broke
in question by appellant, as the record establish
these brokers were already experienced in the
ticular field. In fact, appellee agrees that the
"engaged on the assumption that they underst
technique of selling" (Br. 31).

The argument at page 23, that "ordinarily
dependent contractor is engaged to perform a
ular piece of work" is specious reasoning in t
of the *Greyvan* case where the truckers there
exclusively for Greyvan under a *continuing r*
ship.

To say that the brokers were in "economic

required to paint the designation of the company on their vehicles. Their identity was therefore completely submerged, but that fact had no bearing on the issue.

Appellee further contends that the permanency of the relationship was virtually the same as that of the musicians with their leader—overlooking the permanency of the relationship of the truckers in the *Greyvan* case.

To say therefore, that if the broker's relationship with taxpayer was terminated, he was in "economic reality" a man without a job, totally ignores the ability of the broker to continue selling real estate by virtue of his individual broker's license. So long as he chooses to continue selling real estate and is seeking either listings or prospects, he cannot be said to be a man without a job any more than it can be said that a lawyer or physician is a man without a job merely because he has no clients or patients to represent or administer to at a given moment.

The *Rutherford Food* case cited at page 24 is clearly inapposite since the work of boners for the slaughter house was of a routine nature, performed entirely on the employer's premises during more or less fixed hours of employment, dependent upon the number of cattle slaughtered, and the workers provided their own simple tools, with no opportunity to gain or lose except from the work of their hands and the tools. Their status was therefore very similar to that of the unloaders in the *Silk* case.

Appellee states that the observation of the court in the *Rutherford* case, that the boners were an integ-

ral part of the business, is "particularly significant" inasmuch as the brokers here likewise constituted an integral part of appellant's business, and that "taxpayer could not have stayed in business without their services." The argument is fallacious in fact as well as in law. Were not the truckers in the *Silk* and *Greyvan* cases an "integral part" of the business of retailing coal or transporting freight? Appellant therefore was no more dependent upon its brokers for its existence in business than Silk or Greyvan upon its truckers. Furthermore, appellee overlooks the fact that appellant had its own salesmen-employees who could and did also sell real estate. Its other departments—Property Management and Insurance—certainly were not dependent upon its brokers. Hence, how can it logically be argued that appellant could not have stayed in business without their services?

Appellant agrees that the factual situation controls over provisions of a contract in determining coverage. But how is such rule applicable in the instant case, since appellee has failed to point out a single instance where the factual situation differs in any respect from the contract.

When we reach that portion of appellee's brief devoted to discussion of the case from the "common law control test" (Br. 27-32), we find nothing but a studied effort to distort the facts to fit the law. This portion of appellee's brief abounds in false premises, assumptions and conclusions not supported by the record.

Thus, at page 28 appellee argues that since the relationship was terminable at will, therefore ap-

pellee had the power to discharge, citing page 102 of the record as authority. We invite the court to read that page of the record to see if the word "discharge" is ever mentioned therein. The most that we can find there is that one of appellant's officers testified that if a broker attempted to transact business on his own in connection with the sale of real estate, appellant would consider that "a breach of our agreement." How does this support appellee's contention that appellant had the right to discharge?

The same element however, was present in the *Silk* and *Greyvan* cases. In fact, in all human relationships, outside of slavery, involuntary servitude, and in war, man makes his associations voluntarily, with the expectation that they will prove to his advantage, and if he is disappointed in those expectations, that he can terminate them. Partnerships are simple examples. They are usually terminable at will, but one would scarcely urge that that fact established control. Otherwise, the employee's right to terminate if dissatisfied would likewise establish control in the employee over his employer.

Appellee next argues that the brokers were restricted as to territory and customers. Yet there is not one scintilla of evidence in the record that bears out such a statement. As pointed out at page 12 of our opening brief, the utmost freedom of action was exercised by the broker. Any preference as to territory was of the brokers' own choosing. At no time was a *listing* placed exclusively in a particular broker's hand (Tr. 103, 104, 107, 108). It is true that *prospects* could be referred to some particular broker who was special-

izing in that type of property, but that fact would not prevent another broker in the meantime from attempting to sell the same property, since the original listing would likewise be in his hands (Tr. 104, 105).

Appellee's third point is that the brokers had no identity of their own. Everything that is said concerning this point was also true in the *Silk* and *Greyvan* cases, without any effect whatever upon the court's holding that the truckers were independent contractors. Thus, the truckers working for Greyvan were required to paint the designation "Greyvan Lines" on their trucks, and all bills of lading were between the company and the shipper. The truckers' names at no time appeared in the transaction so far as the customer was concerned. Their identity was completely merged in that of the company for whom they were hauling. How does such an argument, therefore, establish an employer-employee relationship?

Appellee's fourth point is that appellant regulated the quality and quantity of the brokers' work. This statement is factually false under the record. The fact that the brokers agreed to work diligently and to exert their best efforts to rent or sell listed property certainly does not militate against either a joint venture or independent contractor relationship. These elements are present in every such relationship, for it is nothing more than agreement on the part of the joint adventurer or independent contractor to fulfill his part of the bargain. Does not a building contractor, physician or lawyer always agree either expressly or impliedly, that he will perform the particular task in a diligent manner? Here again appellee confuses

the right to terminate such a relationship with the power to discharge an employee. The record proves conclusively that the brokers had the utmost freedom of action as to determining the time, place and manner of fulfilling their part of the bargain (Tr. 72, 89, 91, 133). Appellee's statement, therefore, that the brokers were regulated by the taxpayer as to quality and quantity of their work is nothing more than wishful thinking.

Appellee's next point is that much of the brokers' time was spent on the taxpayer's premises. This statement is as inaccurate as the preceding four contentions. On the contrary, the record shows that most of the work of the brokers is performed outside the office of appellant, and either in the field, purchaser's home or in the office of an attorney or escrow company. The broker likewise received calls at his own home, for his residential telephone number appears in the ads carrying his name. It is true the office of appellant is their headquarters—but so was the building on the premises of Silk used as the focal point for the truckers awaiting their turn to deliver coal.

Point 6, that "taxpayer required the rendition of reports," is another bald statement unsupported by the evidence. At no time were progress reports required from the brokers. The fact that the brokers turned in a signed earnest money receipt and deposit or turned in listings to appellant's office was nothing more than performance of their agreement. How else could the the business be handled in orderly fashion? With the number of men involved, *regardless of the relationship*, it is most natural, in fact obvious, that a single

and common office be selected for bookkeeping, care of funds, listings, telephone and the like. Did not the truckers for Silk and Grayvan collect money and deliver it to the companies? How does this fact alter or affect an independent contractor relationship?

Appellee's final contention on this phase, that "the broker's services were controlled to the extent required in their line of work," is not only meaningless, but immediately contradicted in appellee's own argument immediately following. Thus, appellee concedes that the brokers had considerable freedom in their work, and were not supervised in detail, but says that it was "only the freedom which their type of work required." Contrast their freedom however, with the control exercised over the salesmen in appellant's employ. They too sold and rented real estate—yet they did not enjoy the freedom of the brokers. How then can it be said that the brokers enjoyed only the freedom which their type of work required?

In attempting to answer appellant's contention that the brokers had a proprietary interest in the commission earned, appellee fails to recognize any distinction between the procedure followed in the case of the salesmen-employees and that followed with the brokers, over-looking the fact that in the former case, the *entire commission*, when earned, has gone into appellant's profit and loss account—whereas in the case of brokers—only *one-half thereof* is ever credited to that account.

Appellee's attempts to distinguish the *Koehler* case are weak. The mere fact that the court there was not concerned with the Social Security Act is not a valid

point of distinction, for fundamentally, the issue was identical, viz., a determination of the true business relationship between Meyers and Tucker. No liberal interpretation of the Social Security Act can change a relationship of joint venturer or independent contractor into an employer-employee relationship.

Appellee's attempted distinction over the broker's right to appear at settlements in the *Koehler* case is mere quibble for the contract in the instant case gives each broker the right to his division of the commission *as soon as it has been earned.* We submit that that is the same as having the right to appear at settlements to demand and receive their share.

The right to draw in advance in the *Koehler* case, strengthens rather than weakens appellant's position, for, if anything, it would tend to support the existence of an employer-employee relationship. It is true that up to the moment that a deal is closed and the commission earned, a broker cannot claim any proprietary interest in the fund—but neither can appellant. Up to that point, appellant is the bare custodian of the fund. Not even the property owner can claim his part until all terms of the earnest money receipt are met.

The fact that no privity existed between the broker and the property owner has already been discussed. This element was not only present in the *Koehler* case, but also in the *Silk and Greyvan* cases. So also, the fact that enforcement of the contract between appellant and the property owner would be brought in appellant's name is immaterial. This was precisely the manner in which the commission was collected in the *Koehler* case.

Appellant concedes that it is immaterial what the parties may have called their relationship, since it is the factual practice which controls. Thus, the fact that they agreed that they do not intend the relationship to be that of "joint adventurer or partner" did not prevent the Washington Supreme Court from holding that a joint venture was the relationship created. At any rate they did express an intent to create an independent contractor relationship, and it is immaterial whether this court adjudges the relationship to be either joint venturer or independent contractor, since in either event, there would be no coverage under the Social Security Act.

Appellee makes no attempt to distinguish or even discuss the many state decisions passing on the precise point at issue, cited at pages 30 to 34 of appellant's opening brief. Instead, appellee is content to mention and copiously quote from *one* decision from the State of Georgia, and print in full an untried administrative ruling by the Commissioner of Internal Revenue. These are presented by appellee as being more persuasive than decisions from the highest courts of Missouri, New York, Oklahoma, Tennessee, Washington, and California.

It is significant that even the solitary case cited by appellee did not involve licensed real estate *brokers*. Georgia, like Washington, issues licenses to real estate *brokers* as well as real estate *salesmen*. Those involved in the *Babb* case were *salesmen* and not *brokers*, and were expressly made "sub-agents" of the broker with respect to clients and customers. The Georgia law defining real estate salesmen, provides:

> "Real estate salesman means a person *employed* by a licensed real estate broker to sell or offer for sale * * * real estate * * * *for or on behalf of such real estate broker;* also any person, other than bookkeepers and stenographers, *employed* by any real estate broker." Georgia code, Sec. 84-1402

In other words, the salesmen involved in the *Babb* case, corresponded to plaintiff's salesmen—employees, upon whom Social Security taxes have always been paid.

Furthermore, it nowhere appeared in the *Babb* case that the commissions were held in trust and received by neither until earned. The commission therefore in the *Babb* case when earned, became the property of the employing broker, who owed the salesmen a commission just as any employer owes his salesman employee his salary. The broker there had chosen to establish relations not with licensed independent real estate *brokers*, but with real estate men licensed to act only as the broker's salesmen-employees. To have upheld the broker's contentions there would have meant giving approval to acts made illicit by express statute.

A further point of distinction lies in that the salesmen in the *Babb* case could sell only property listed with the employing broker, while here the brokers associated with appellant could and often did make sales of property in advance of any listing with appellant. Furthermore, the salesmen there would clearly be "without a job" if their services were terminated, since their license permitted them to work only for

another broker, and not to engage in business on their own.

The ruling of the Acting Commissioner of Internal Revenue of April 15, 1945, *reversing his previous ruling*, may be dismissed for the reason first, that we are here concerned, not with real estate *salesmen* paid by the firm in the same manner as other employees working on commission, but with *brokers* having a *proprietary* interest, and secondly, no ruling of the Commissioner can enlarge or amend the controlling statute or overrule judicial interpretations.

This ruling furthermore does not cover the same facts as are involved herein, since it is predicated upon the provisions in state *salesmen* license laws and upon requirements that salesmen call upon designated prospective buyers, pursue certain sales techniques, make required reports, the employing broker controlling the *means* and *methods* to be used; and salesmen spending alternate days in the office handling such new business as the broker dictates. In other words, the ruling is based upon the identical practice followed as to plaintiff's salesmen employees as distinguished from the brokers involved herein. It is significant that the zeal and diligence of appellee's counsel has failed to produce any citation upholding the Acting Commissioner except the *Babb* case. Not one decision involving licensed real estate *brokers* has been produced by appellee, supporting his contention that the normal business relationship existing between a real estate office and brokers associated with it under circumstances identical to those at bar, was that of employer and employee.

CONCLUSION

We respectfully reiterate therefore, that under the admitted facts and the overwhelming decisions of state courts which have passed on identical facts, these brokers should be held to fall outside the coverage of the Social Security Act, since they are not employees under the normal business meaning of the word.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
JOSEPH J. LANZA,
Attorneys for Appellant.